82-5082

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,
Petitioners,

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has jurisdiction to hear an appeal where the only Notice of Appeal filed by the Appellant is deprived of any effect by Fed. R.A.P. 4(a)(4) and a valid Notice of Appeal is not timely filed as required by Fed. R.A.P. 4(a)(1).

2. Whether the Court of Appeals has the power to waive the requirement of Fed. R.A.P. 4(a)(4) that a new Notice of Appeal be filed after resolution of a post trial motion, consistent with the limitations imposed by Fed. R.A.P. 2 and 26(b).

3. If the Court of Appeals has the power to waive the requirements of Fed. R.A.P. 4(a)(4), must an appellant demonstrate good cause in order for the waiver to be granted or may the Court of Appeals shift the burden to an appellee to demonstrate that it will be prejudiced by an appellant's noncompliance with Rule 4(a)(4).

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TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,

Petitioners,

v.

PROVIDENT CONSUMER DISCOUNT COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Robert C. Griggs and Jacqueline M. Griggs respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 2, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 503 F.Supp. 249 (E.D. Pa. 1980) and is also reprinted in the Appendix.

STATEMENT OF SUPREME COURT JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 2, 1982. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1524(1).

RULES OF FEDERAL APPELLATE PROCEDURE INVOLVED

Fed. R.A.P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A

notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R.A.P. 2 provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Fed. R.A.P. 26(b) provides:

> Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Fed. R.A.P. 4(a)(1) provides:

> In a civil case in which an appeal is permitted by law as of right from a district

court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

Petitioners Robert C. Griggs and Jacqueline M. Griggs instituted this action against respondent Provident Consumer Discount Company in the United States District Court for the Eastern District of Pennsylvania on May 21, 1980.[1/] On December 24, 1980, by Memorandum and Order, the District Court entered judgment in petitioners' favor pursuant to Fed. R. Civ. P. 56.(App. B).

1/ The action was brought for violations of the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq. The jurisdiction of the District Court was invoked pursuant to section 130(e) of the Act, 15 U.S.C. §1640(e) and 28 U.S.C. §1337, which provides for jurisdiction over an action arising under any Act of Congress regulating commerce.

On November 5, 1981, after a remand of the case from the United States Court of Appeals for the Third Circuit,[2/] the District Court entered an Order, pursuant to Fed. R. Civ. P. 54(b), directing entry of final judgment upon its prior Orders. On November 12, 1981, respondent filed a timely Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59. On November 19, 1981, while its Rule 59 Motion was still pending, respondent filed the Notice of Appeal which is the subject of this Petition. On November 23, 1981, the District Court denied respondent's Rule 59 Motion and the case proceeded exclusively thereafter in the Court of Appeals.

On December 4, 1981, the Clerk of the Court of Appeals informed counsel by letter that the case had been docketed in the appellate court. In addition, the Clerk's letter notified counsel in bold print of the applicability of Fed. R.A.P. 4(a)(4) in this case.(App. C). Respondent took no action in response to the Clerk's letter.

On February 1, 1982, petitioners filed a Motion to Dismiss respondent's appeal to the Third Circuit for lack of jurisdiction.

2/ Respondent filed a Notice of Appeal to the Third Circuit from the District Court's decision on January 16, 1981. By an Order dated October 2, 1981, the Third Circuit remanded the case to the District Court.

The ground for the Motion was that, under Fed. R.A.P. 4(a)(4), a Notice of Appeal filed during the pendency of a Rule 59 Motion to Alter or Amend Judgment is of no effect and a new Notice of Appeal must be filed within the prescribed time measured from the entry of the Order disposing of the Rule 59 Motion. In the instant case, respondent filed its Notice of Appeal while its Rule 59 Motion was still pending in the District Court and did not file a new Notice of Appeal after the District Court denied the Rule 59 Motion. Petitioners emphasized in the Third Circuit that Rule 4(a)(4) had recently been amended to eliminate any doubt that respondent's Notice of Appeal was ineffective and that a new Notice of Appeal should have been filed.

Petitioners also argued that, if Rule 4(a)(4) could ever be waived, no good cause for such a waiver existed in this case. Here respondent failed to act even though the Clerk of the Third Circuit Court of Appeals specifically notified respondent's counsel of the applicability of Rule 4(a)(4).

On June 2, 1982, the Third Circuit issued an opinion and judgment reversing the judgment of the District Court. (App. A). Despite its recognition of respondent's failure to comply with Fed. R.A.P. 4(a)(4), the Court denied petitioner's Motion to Dismiss. The Court held that appellants who fail to comply with Rule 4(a)(4)

will nonetheless be permitted to proceed on appeal unless the appellee can show prejudice resulting from appellants' noncompliance with Rule 4(a)(4). The Court's entire discussion of the issue consisted of the following footnote in its opinion:

> The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that "[a] notice of appeal filed before the disposition of any of the above motions shall have no effect." Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice... . In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal.

Slip. op. at 3 n.2. (App. A) [citations omitted].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH SEVERAL OTHER COURTS OF APPEALS AS TO THE EXTENT OF FEDERAL APPELLATE JURISDICTION UNDER FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(4)

Federal Rule of Appellate Procedure 4(a)(4), as amended in 1979, provides that a notice of appeal filed during the pendency of a timely motion under Fed. R. Civ. P. 59 "shall have no effect." Despite the clear language of this rule, the Third Circuit Court of Appeals has repeatedly given effect to such a notice of appeal,

holding that such a notice does vest appellate jurisdiction in the appellate court which will be exercised absent a showing of prejudice by the appellee.

This holding places the Third Circuit in square and irreconcilable conflict with three other courts of appeals, which have held that, unless a new and timely notice of appeal is filed after the disposition of a Rule 59 motion, the appellate court has no jurisdiction over an appeal based upon a notice of appeal filed before that disposition.

The Fifth Circuit, in Williams v. Bolger, 633 F.2d 410 (5th Cir. 1980), and later in Beam v. Youens, 664 F.2d 1275 (5th Cir. 1982), was the first court of appeals to specifically address the amendments to Appellate Rule 4(a). That court held that the effect and intent of the amendment was to overrule previous decisions of some courts of appeal, including its own, which had allowed an appeal to proceed based upon a notice of appeal filed while a Rule 59 motion was pending. The court quoted the Notes of the Advisory Committee to the amendment as having "clearly vindicated" those courts which held that not even an "equitable excuse" could save such an appeal. 664 F.2d at 412-13 n.2.

The Sixth Circuit has come to the same conclusion in a number of cases, including Bache Halsey Stuart Shields, Inc. v. Gitre, ___ F.2d___ (6th Cir. 1981). In an unreported slip opinion (avail-

able on LEXIS), that court of appeals also held that Rule 4(a)(4) is jurisdictional and that the lack of prejudice to the appellee did not alter that fact under the rule as amended. The court held that since there was no effective timely notice of appeal, it had no power to waive or extend the requirements of the rule, citing Browder v. Director, Department of Corrections, 434 U.S. 257 (1978).

Lastly, the Tenth Circuit has always taken the position, even before the amendment to Rule 4(a), that a court of appeals has no jurisdiction over an appeal in which there is no timely notice of appeal filed after disposition of a Rule 59 motion. Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979). Certainly, this position can be expected to continue now that it has been "vindicated" by the recent rule amendments.

In addition, several other courts of appeals have strongly indicated that they would hold contrary to the Third Circuit's decision if faced with the issue presented here. The Eleventh Circuit, in United States v. Valdosta-Lowndes County Hospital Authority, 668 F.2d 1177, 1178 n.2 (11th Cir. 1982), made clear that it considered itself bound by the result reached by the Fifth Circuit, which it noted as contrary to the Third Circuit.

The Ninth Circuit, in Calhoun v. United States, 647 F.2d 6, 10 (9th Cir. 1981), in allowing an appeal filed after oral announcement of a trial court's decision on a Rule 59 motion, but before issuance of a written order, stated that only its interpretation of the word "disposition" as including oral announcement of a Rule 59 decision saved the appeal from being "a nullity under Rule 4(a)(4)."

Finally, both the Seventh and Eighth Circuit Courts of Appeals have discussed the amendment to Rule 4(a)(4) in decisions construing Appellate Rule 4(b). In United States v. Moore, 616 F.2d 1030, 1032 n.2 (7th Cir. 1980) cert. denied, 446 U.S. 987 (1980), the Seventh Circuit stated that the amendment was intended to resolve an ambiguity under which some courts had held premature notices of appeal effective in civil cases. In finding a premature notice of appeal effective in a criminal case under Rule 4(b) the court expressly distinguished the civil rule, finding that the "obstacle" created by the new language in Rule 4(a)(4), which would block a civil appeal, was deliberately omitted from Rule 4(b). The Eighth Circuit, in United States v. Jones, 669 F.2d 559, 561 (8th Cir. 1982), indicated that even in a criminal case under the more liberal wording of Rule 4(b), an appeal will be dismissed if the clerk notifies the appellant of the defect in the premature appeal (as occurred in the petitioners' case) and it is not corrected. Such a dismissal in a criminal case, the

court held, would "conform to the provisions of Rule 4(a)(4)" governing civil cases.

Unlike the courts of appeal discussed above, the Third Circuit has refused to recognize the intent of the 1979 amendment to Rule 4(a)(4) and has stubbornly continued to follow the preamendment case law.

The conflict between the decision of the Third Circuit in this case and the decisions of the circuits cited above justifies the grant of certiorari to review the judgment below.

II. THE DECISION BELOW RECREATES THE VERY PROBLEM WHICH THE AMENDMENT TO APPELLATE RULE 4(a) WAS DESIGNED TO ELIMINATE

The decisions of the Third Circuit Court of Appeals in this case and an earlier case serve to defeat the goal of the amendment to Rule 4(a) by once more rendering uncertain the status of an appeal filed during the pendency of a post trial motion. If this petition is not granted, that uncertainty will persist until such time as this Court does address the issue. The Third Circuit, having been made aware of the authority contrary to its decision, has made clear that it will continue in its interpretation holding that Rule 4(a)(4) creates only a waivable nonjurisdictional defect in an otherwise proper appeal.

The Advisory Notes to the amendment to Rule 4(a) explain that the amendment was intended to end the previous split among

the circuits, as to the effect of a premature appeal, which the Third Circuit now continues:

> The amendment would make it clear that [where a notice of appeal is filed prior to disposition of a post trial motion] the appellant should not proceed with the appeal during the pendency of the motion but should file a new notice of appeal after the motion is disposed of. [emphasis added]

As stated in Wright and Miller, Federal Practice and Procedure: Jurisdiction § 3950 (1980 supp.):

> Under this provision, any notice of appeal filed before disposition of such a motion, whether or not the notice was premature, loses its effect, and must be replaced by a new notice after disposition of the motion.

As noted above, a number of other courts of appeals have recognized the intent to make clear that an appeal such as that in this case must be dismissed. Williams v. Bolger, supra; Bache Halsey Stuart Shields, Inc. v. Gitre, supra; United States v. Moore, supra. Unfortunately, the Third Circuit has not recognized this intent, and has continued to follow preamendment case law. Indeed, the instant case represents a further extension of the Third Circuit's previous divergence from the majority view.

The first postamendment case in which the Third Circuit considered Appellate Rule 4(a)(4) was Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3rd Cir. 1981), cert. denied

___ U.S. ___, 102 S. Ct. 390 (1981).[3/] There the court held that Rule 4(a)(4) did not set jurisdictional requirements, and that the court had the power to waive the premature filing under Federal Appellate Rule 2, which requires a showing of good cause by the appellant to excuse a defect.

The Third Circuit moved one step further away from the rule's intent in the matter now presented for review. In its decision below, the court held that the provision providing that the notice of appeal had no effect would be waived as a matter of course unless the appellee could sustain a burden of showing prejudice. Indeed, this interpretation of the rules virtually reads Rule 4(a)(4) out of existence, since it will be almost impossible for an appellee ever to show prejudice from a premature appeal. Moreover, the Third Circuit's focus on the issue of prejudice is inappropriate. The primary purpose of the rule was never to protect appellees; it was rather to avoid the confusion as to jurisdiction and location of the record which results from premature appeals being considered as valid.

Petitioners' case thus raises a number of questions as to the application of the Federal Rules of Appellate Procedure that

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3/ In Tose, the failure to dismiss the appeal had no effect on the ultimate outcome of the case, since the decision of the trial court was affirmed. The petition for certiorari filed by appellants could not, therefore, have questioned the Rule 4(a)(4) ruling of the Court of Appeals.

this Court has never addressed. Among these are:

(1) Does compliance with Federal Rule of Appellate Procedure 4(a)(4) constitute a jurisdictional requirement? This Court has held that the filing of a timely notice of appeal is "mandatory and jurisdictional." Browder v. Director, Department of Corrections, supra. If, under Rule 4(a)(4) the notice of appeal in this case had no effect, then there was no timely notice of appeal and no appellate jurisdiction. The Third Circuit's opinion appears to create an exception to the general rule requiring a timely appeal for a case where a notice of appeal, though deemed to have no effect, has been filed, in that it assumes jurisdiction to decide such a case. This exception has not been recognized by any other court.

(2) Can a defect under Appellate Rule 4(a)(4) be waived under Appellate Rule 2? In Tose, supra, the Third Circuit relied upon Federal Appellate Rule 2 to waive the noneffectiveness of the defendant's notice of appeal ordained by Rule 4(a)(4). The Third Circuit did not address whether it was, in effect, waiving the filing of a timely notice of appeal, an act not permitted under Appellate Rules 2 and 26(b). Nor did it directly address how it had acquired jurisdiction to decide anything more than whether it had jurisdiction. Unless the defendant's appeal, which under Rule 4(a)(4) had no effect, was considered to be a timely

appeal, the appellate court had no jurisdiction to waive any requirement of the rules.

(3) If Appellate Rule 4(a)(4) can be waived, what standard must be met to justify waiver? In petitioners' case, the Third Circuit held that the requirements of Rule 4(a)(4) would be waived unless the appellee could show prejudice resulting from the lack of a proper appeal. This standard cannot be derived from the rules since even Appellate Rule 2 would require the appellant to show good cause for a waiver. As noted above, the requirement that an appellee show prejudice would rarely if ever be met, thus effectively reading out of existence the amendment which deprives a premature appeal of any effect. If the Third Circuit saw fit to hear an appeal in the present case, where its clerk had sent a specific notice to the appellant of the defect in the appeal in time for that defect to be corrected, it is hard to imagine any case where a waiver of the Rule 4(a)(4) requirement of a new notice of appeal would not be granted. There is no justification for the appellant's steadfast disregard in this case for the procedural framework governing all parties in the federal system.

The Third Circuit has stated no persuasive reason why the clear dictates of the rules should be nullified in this manner so contrary to their intent.

Certainly, the decisions of the Third Circuit Court of Appeals stand as a concrete barrier to effectuation of the goals of the drafters of the 1979 amendment--uniformity of practice among the circuits with respect to appeals filed during the pendency of post trial motions. In the Third Circuit thus far, the amendment has made no difference whatsoever in the treatment of such appeals. At this point it is apparent that only a definitive ruling from this Court can achieve the objective of the amendment. That objective of clear guidelines for litigants and the courts, governing all cases in every circuit, can and should be attained, by a grant of certiorari in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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On the Brief:

ERIC L. FRANK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2989

ROBERT C. GRIGGS and
JACQUELINE M. GRIGGS

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant

(D.C. Civil No. 80-01930)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: May 13, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**

(Opinion Filed: June 2, 1982)

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Attorney for Appellees

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*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

The Provident Consumer Discount Company (Provident) appeals from a final order of the district court assessing statutory damages against it for violating the Truth in Lending Act (the Act), 15 U.S.C. §1601 *et seq.*, and Regulation Z of the Federal Reserve Board, 12 C.F.R. §226.1 *et seq.* We hold that the district court erred in holding that a disclosure statement violated the Act and the Regulation. Thus we reverse and remand for consideration of other contentions.

I.

In June 1979, Robert and Jacqueline Griggs (Griggses) obtained a personal loan from Provident for $2940. At that time they received from Provident a document entitled "Note, Security Agreement and Disclosure Statement" which in paragraph 17-E set forth the extent and nature of Provident's security interests in plaintiffs' real and personal property. Soon thereafter, plaintiffs filed a Petition in Bankruptcy. After being discharged from their obligations, they instituted this action, alleging that Provident violated the Act and Regulation Z in three respects. They contended (1) that the description of Provident's security interest taken in after-acquired property is inaccurate and misleading; (2) that Provident improperly calculated the refund of prepaid interest due on an earlier loan refinanced by the present loan, and (3) that the inclusion in the disclosure statement of a non-existent security interest in insurance proceeds was improper. Provident counterclaimed for a setoff against any recovery of the Griggses' pre-bankruptcy obligations to it. The district court dis-

missed Provident's counterclaim, and granted summary judgment to the Griggses.[1] The court held that Provident's disclosure of its security interests in after-acquired property was inaccurate and misleading to potential borrowers. The remaining contentions were not reached since one violation of the Act is sufficient to establish liability for statutory damages. Having determined liability, the court awarded the Griggses separate recoveries of $1000.00 each under 15 U.S.C. §1640(a). Provident filed a Notice of Appeal from the order on January 16, 1981.[2] We dismissed that appeal because the district court's order was not appealable under Fed. R. Civ. P. 54. Subsequently, the district court directed the entry of a separate final judgment under Rule 54(b). On November 17, 1981 defendant filed in the district court a Motion for Reconsideration and Motion to Alter, Amend and Vacate Judgment. On November 19, 1981, a Notice of Appeal was filed. On November 23, 1981, the district court dismissed Provident's motions.

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1. The district court opinion is reported. 503 F. Supp. 246 (E.D. Pa. 1980).

2. The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that "[a] notice of appeal filed before the disposition of any of the above motions shall have no effect." Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3d Cir.), *cert. denied*, 101 S. Ct. 390 (1981); Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975); *accord* Williams v. Town of Okeboji, 599 F.2d 238 (8th Cir. 1979). *See also* 9 Moore's Federal Practice ¶204.14 (2d ed. 1982). In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal.

II.

Section 1601 of the Act sets forth the congressional purpose for enacting the Truth in Lending Act:

> The Congress finds that economic stability would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

15 U.S.C. §1601 (1976). The Act was passed to prevent the unsophisticated consumer from being misled as to the total cost of financing. *See Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, 363-69 (1973). It mandates the disclosure of certain information in financing agreements and enforces that mandate by "a system of strict liability in favor of consumers who have secured financing when [the] standard[s] [are] not met." *Thomka v. A.Z. Chevrolet*, 619 F.2d 246, 248 (3d Cir. 1980); 15 U.S.C. §1640(a). *See also Ives v. W.T. Grant Co.*, 522 F.2d 791 (2d Cir. 1975). A plaintiff thus does not need to show that he was in fact deceived by substandard disclosures. *See Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3d Cir. 1979) (*per curiam*). Moreover, since the Act provides for statutory damages in addition to actual damages, a plaintiff need not even show actual harm.

The Act obligates "[e]ach creditor . . . [to] disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under [the

Act]." 15 U.S.C. §1631. Part of that information is "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." 15 U.S.C. §1639(a)(8). No liability can result, however, from "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [Federal Reserve] Board." 15 U.S.C. §1640(b).

The Federal Reserve Board has issued Regulation Z, 12 C.F.R. §226.1 *et seq.*, pursuant to its rulemaking powers conferred in Section 1604 of the Act, 15 U.S.C. §1604 (1976). Regulation Z mandates that "[t]he disclosure [under the Act] . . . be made clearly, conspicuously, [and] in meaningful sequence." 12 C.F.R. 226.6(a), and that "additional information or explanations may be supplied with any disclosure required . . ., but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required." 12 C.F.R. §226.6(c). The creditor must provide "[a] description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates. . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." 12 C.F.R. §226.8(b)(5). Special deference must be given the Board regulations since a determination of what is "meaningful disclosure" under the Act is an empirically achieved balance between incomplete disclosure and informational overload, a task to which the Board is better suited than the courts. *See Ford Motors Credit Co. v. Milhollin*, 444 U.S. 555, 568-69 (1980).

Our task is to determine whether the district court committed an error of law in applying the Act and Regulation Z.[3] Paragraph 17-E of Provident's "Note, Security Agreement and Disclosure Statement" provides:

> E. SECURITY: Until the Total of Payments and all other obligations of Borrower to Provident, direct, or contingent, joint, several or independent, now or hereafter existing, due or to become due, whether created directly or acquired by assignment or otherwise, have been paid in full and as security therefor, Borrower grants Provident a security inter-

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3. This is not a case where the court was presented with a record containing conflicting evidence in the form of written documents from which it had to draw factual inferences. Were that the case, Rule 52(a) would require us to review the findings under the "clearly erroneous rule."

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. . . . The rule does not apply to conclusions of law . . . [nor does it] furnish particular guidance with respect to distinguishing law from fact."

Pullman-Standard v. Swint, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982). The issue before us is one of drawing a legal conclusion regarding the consequences of a document. *See generally*, Borden Co. v. Clearfield Cheese Co., 369 F.2d 96 (3d Cir. 1966). The district court cannot, by couching a legal conclusion as a finding of fact, prevent appellate review of legal errors. *Cf.* Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225 (3d Cir. 1977) (whether trademark acquired secondary meaning outside the paper goods product line); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975) (whether defendant's chart infringes copyrighted chart as a matter of law); Sears, Roebuck and Co. v. Johnson, 219 F.2d 590 (3d Cir. 1955) (trade name infringement established as a matter of law).

est in the following assets and all cash and non-cash proceeds thereof ("Collateral"):.

1. [ ] The following motor vehicle, complete with all attachments, equipment, accessories and additions:

MAKE SERIAL NO. BODY STYLE MODEL YEAR

2. [x] All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.

3. [x] Real Property (by a Mortgage and Judgment Note of even date):
Address of Real Property: *2121 E. Orleans St, Phila., Pa.*

4. [x] Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.

5. [x] Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT.

The issue is the legal import of the bold faced after acquired property clause at the end of the paragraph.[4]

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4. The Griggses also claim that Paragraph 17-E 5 is inaccurate and confusing because it refers to non-existent insurance. This argument is without merit. Paragraph 17-E 5 indicates that there is a security interest in insurance required or purchased in accordance with Paragraph F. Paragraph F, in turn, indicates that no insurance

The bold faced section is part and parcel of the security disclosure paragraph. It comes immediately at the end of the description of security and specifically indicates that it addresses "the security interest set forth herein," *i.e.*, in Paragraph 17-E. Whatever the bold faced words might mean if standing alone, they form part of the paragraph and must be interpreted in that context.[5]

Reading the bold faced section in the context of the entire Paragraph 17-E, the reference to after-acquired personal property is modified by Paragraph 17-E 2 to mean household goods and only those acquired within ten days of the loan transaction. The reference to after-acquired real property is accurate as to paragraph 17-E 4 since under Pennsylvania law, in the event plaintiffs' Judgment Note is recorded or recovered upon, all the real property then owned by plaintiffs (including those acquired after the loan issues) in the county where the judgment is entered of record, becomes subject to the lien. 42 Pa. Cons. Stat. Ann. §4303 (Purdon 1981). The bold faced section has no application to Paragraph 17-E 3 since that paragraph contains no after-acquired provisions but instead describes a well defined mortgage on a well defined property. The bold faced sub-paragraph

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NOTE — *(Continued)*

was purchased. Paragraph 17-E 5 alone does not show that there is a security interest in insurance proceeds and we, therefore, find no inaccuracy. Moreover we fail to see any source of confusion or obstruction when upon reading 17-E 5 the borrower refers to Paragraph F and finds it completely blank. It would be apparent to even the most unsophisticated borrower that there is no insurance and hence no security interest.

5. We agree with the Griggses that if the bold faced section in conjunction to paragraph 17-E were to disclose more security interests than what defendant actually had, there would be a violation of the Act and regulations. The purpose of the Act is for customers to be able to make informed decisions. This would be adversely affected as much by overstating a lender's security interests as by understating them.

thus is modified by the substantive provisions preceding it, and a reading of the paragraph as an integral whole indicates no inaccuracies.

The district court also held that, even if accurate, the bold faced section was confusing and misleading, because "there is no reason for the additional confusing information to be present. . . . If the bold print adds nothing to the security interest taken, there is no reason to have it in the form at all." 503 F. Supp. at 250. We disagree. The bold faced section fulfills a useful function. It signals to the potential customer that after-acquired propety will be subject to defendant's security interest and, thereby, insures that the customer focus on the preceding paragraph to understand the full scope of his commitments. The Board regulations specifically require that "[i]f after-acquired property will be subject to the security interest. . ., the fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." 12 C.F.R. §226.8(b)(5). This requirement of clear disclosure of "after acquired property security interests" justifies Provident's use of a bold face warning flagging a customer's attention to the existence of such security interest.

Thus we hold that the district court erred in determining that defendant violated the Act and Regulation Z in its disclosure of security interests. The district court did not, however, reach plaintiffs' allegations that the defendant improperly calculated the refund due to them of interest prepaid on the original loan. Neither can we, absent district court factfinding. We must therefore remand for a determination of the Griggses' remaining grounds for relief.

III.

Since on remand the question may arise of setting off plaintiffs' pre-bankruptcy obligations to Provident

against their recovery, if any, that question should be addressed.

The Act has important penal characteristics. *See Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 376 (1973); *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68 (9th Cir. 1980); *Newton v. Beneficial Finance Company of New Orleans*, 558 F.2d 731 (5th Cir. 1977). The Senate Report stated:

> The enforcement of the bill would be accomplished largely through the institution of civil actions authorized under section 7 [15 U.S.C. §1640] of the bill. Any creditor who fails to disclose the required information would be subject to a civil action with a penalty of twice the finance charge. . . . The committee has not recommended investigative or enforcement machinery at the Federal level, largely on the assumption that the civil penalty section will secure substantial compliance with the act.

S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967). The Report indicates a congressional intent to deter improper disclosure practices by a system of civil liability. The Act allows recovery even when the complainant was not deceived by misdisclosure, and provides for statutory damages *in addition* to actual damages. Thus the Act imposes a civil penalty, the purpose of which is to provide an incentive for private litigants to institute actions and thereby enforce the Act's provisions.

A setoff of bankruptcy discharged debts owed a creditor would interfere with the penal purpose of the Act. *Newton v. Beneficial Finance Company of New Orleans, supra*, 558 F.2d at 732; *see also Riggs v. Government Employees Finance Corp., supra*, 623 F.2d at 73-75. If a creditor were allowed a setoff, the deterrent effect of the civil penalty liability would be reduced. A setoff would remove incentives for an obligor to sue under the Act. Moreover, a setoff would be anomalous since the cause of action inures to the plaintiff as a pri-

vate attorney general. Superficially it may appear unfair to Provident to make it pay statutory damages in addition to the losses incurred as a result of the Griggses' bankruptcy. The losses due to bankruptcy, however, are a product of Provident's judgment in making a loan. Bankruptcy is a business risk which any lender takes. Bankruptcy losses are thus independent from the Act and Provident cannot rely on these losses for relief from the Act's penalty provisions. Neither can Provident complain that the Griggses receive a windfall by recovering damages under the Act while having their loan discharged. That windfall is provided by Congress in order to stimulate truth in lending suits. We hold, therefore, that there can be no setoff of the bankruptcy discharged debt against any recovery of statutory damages. *Accord Newton v. Beneficial Finance Company of New Orleans*, 558 F.2d 731 (5th Cir. 1977); *see Riggs v. Government Employees Financial Corp.*, 623 F.2d 68 (9th Cir. 1980). *Cf. McCullom v. Hamilton National Bank*, 303 U.S. 245 (1938) (debt discharged by bankruptcy cannot be used to offset a penalty, imposed by federal statute, against national bank for taking usurious interest.).

IV.

The judgment appealed from will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2989

GRIGGS, ROBERT C. and GRIGGS, JACQUELINE M.

vs.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant

(D.C. Civil No. 80-01930)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER, Circuit Judges and GERRY, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 13, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Sally Dimond
Clerk

June 2, 1982

*Honorable John F. Gerry, United States District Judge for the District

Construing the Act's preemption clause to forbid state regulation of exempted air carriers would make the foregoing provisions of Title IV meaningless. More than contemplating the existence of state regulation, they obviously rely upon and adopt it.

A statute's purpose is also a key to its meaning. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980). Nothing in the preemption clause's purpose indicates any intent or necessity for prohibiting state regulation of exempt air carriers. Congress enacted the preemption clause to resolve "uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." House Report No. 95–1211 at 16, 4 U.S.Code and Admin.News 1978, pp. 3751, 3752 (1979) (footnote omitted). When a carrier is exempt and its rates, therefore, are not regulated by the CAB, state regulation will not cause "uncertainties and conflict."

Expanding the scope of the statutory purpose examined from the purpose of the preemption clause to the purpose of the entire Airline Deregulation Act, there is still no indication that Congress intended for exemption from Civil Aeronautics Board regulation to preempt state regulation of airlines. The entire Airline Deregulation Act of 1978, the House Report No. 95–1211 (4 United States Code and Administrative News, p. 3737 [1979]), and the House Conference Report No. 95–1779 (4 United States Code and Administrative News, p. 3773 [1979]) all indicate Congress' purpose was reducing federal regulation of airlines. Only where state and federal regulation overlap did Congress indicate any purpose to affect state regulation. There is no overlap in state regulation of exempt air carriers.

All logically relevant factors lead to the conclusion that states may regulate air carriers exempted pursuant to Title 49, United States Code, Section 1386(b)(4), from Board regulation. Such exemptions are not grants of authority under subchapter IV, and the preemption clause, therefore, does not affect state regulation. This conclusion is not inconsistent with the decision in *Braniff International, Inc. v. Florida Public Service Commission*, TCA No. 76–4 (March 30, 1979), which declared Section 330.53, Florida Statutes (1979), expressly preempted

> Florida Statutes § 330.53 empowers the Florida Public Service Commission 'to disapprove any change in a rate, fare, or schedule between points in this state of a person engaged in air transportation pursuant to a certificate or certificates issued by the Civil Aeronautics Board pursuant to s. 401 of the Federal Aviation Act of 1958 ....'

Id. at 2; footnote omitted. In contrast Florida's jurisdiction over Charter Air is created in a statute neatly meshing with the preemption clause and carefully excluding from its purview persons operating under certificates of authority from the Board. § 330.46, Fla.Stat. (1979).

The Plaintiff's Motion for Summary Judgment is denied. The Defendant's Motion for Summary Judgment is granted. The Clerk shall assess all lawful costs against the Plaintiff.

Robert C. GRIGGS and Jacqueline M. Griggs

v.

PROVIDENT CONSUMER DISCOUNT COMPANY.

Civ. A. No. 80–1930.

United States District Court, E. D. Pennsylvania.

Dec. 24, 1980.

Husband and wife filed action seeking to recover against creditor for violation of

the Truth in Lending Act. Parties filed cross motions for summary judgment. The District Court, Joseph S. Lord, III, Chief Judge, held that the after-acquired property clause printed in bold face on the disclosure statement in the Truth in Lending Act transaction violated the Act as to both real and personal property where the mortgage the creditors took in connection with the transaction applied only to the plaintiffs' residence, as was specifically set forth in the legitimate security interest taken in real property, but the after-acquired property clause incorrectly disclosed the security interest in all real property acquired in the future and the clause as it related to after-acquired personal property was not limited to such goods the debtor would acquire within ten days after the creditor gave value and therefore violated Pennsylvania law limiting the security interest a creditor could hold in after-acquired consumer goods.

Motion for summary judgment granted.

1. Consumer Credit ⇐50, 51

Truth in Lending Act and regulations promulgated under Act require creditor to disclose relevant credit information to consumer in comprehensible language and form; required disclosures are intended to provide, especially to inexperienced and uninformed consumer, way to avoid possibility of deception, misinformation, or at least obliviousness to true costs of credit transaction. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

2. Consumer Credit ⇐56

Creditor in Truth in Lending Act transaction must clearly describe or identify any security interest retained by creditor. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

3. Consumer Credit ⇐56

After-acquired property clause contained in disclosure statement for Truth in Lending Act transaction violated Truth in Lending Act as to real property in that purported disclosure of security interest in all after-acquired real property was inaccurate when mortgage creditors took in connection with transaction applied only to borrowers' residence. Truth in Lending Act, § 129(2)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

4. Consumer Credit ⇐56

After-acquired property clause contained in financial disclosure statement for Truth in Lending Act transaction was inaccurate as concerned after-acquired personal property where Pennsylvania law limited security interest creditor could hold in after-acquired consumer goods so that creditor could acquire security interest in such goods only where debtor acquired rights in goods within ten days after creditor gave value, but bold print after-acquired property clause failed to confine interest to personal property acquired within ten days. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700; 13 Pa.C.S.A. § 9204 (d)(2).

5. Consumer Credit ⇐51

Misleading and confusing disclosures as well as failures to disclose constitute violations of Truth in Lending Act and Regulation Z. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

6. Consumer Credit ⇐56

Even if general after-acquired property provision in Truth in Lending Act transaction merely related back to specific provisions of paragraph in disclosure statement, general after-acquired property provision violated Truth in Lending Act where there was no reason for additional confusing in-

formation to be present, no satisfactory reason was offered to explain why bold print clause was included on disclosure statement and confusion would have been lessened if bold print clause had been omitted from form altogether. Truth in Lending Act, § 129(a)(8) as amended 15 U.S.C.A. § 1639(a)(8); Truth in Lending Regulations, Regulation Z, § 226.8(b)(5), 15 U.S.C.A. foll. § 1700.

7. Consumer Credit ⇐50

Requirements of Truth in Lending Act are highly technical, but full compliance is required; even minor violations of Act cannot be ignored. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

8. Consumer Credit ⇐64
Federal Civil Procedure ⇐2515

Question of whether lender's Truth in Lending Act disclosures are inaccurate, misleading or confusing ordinarily will be for fact finder; however, where confusing, misleading and inaccurate character of disputed disclosure is so clear that it cannot reasonably be disputed, summary judgment for plaintiff is appropriate. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Truth in Lending Regulations, Regulation Z, § 226.1 et seq., 15 U.S.C.A. foll. § 1700.

9. Consumer Credit ⇐67

Where husband and wife were co-obligors in Truth in Lending Act transaction, language of Act provides for separate recovery by each consumer involved in transaction and, therefore, each one could recover twice amount of finance charge up to maximum of $1,000, as Act does not limit consumers to one recovery per transaction. Truth in Lending Act, § 130(a) as amended 15 U.S.C.A. § 1640(a).

1. The Truth in Lending Act is the short title of Title I of the Consumer Protection Act, 15 U.S.C. §§ 1601 *et seq.*

Henry J. Sommer, Community Legal Services, Inc., Philadelphia, Pa., for plaintiffs.

Sheldon C. Jelin, Philadelphia, Pa., for defendant.

MEMORANDUM

JOSEPH S. LORD, III, Chief Judge.

Plaintiffs and defendant have filed cross-motions for summary judgment in this Truth in Lending Act[1] (TILA) case. On June 19, 1979, the plaintiffs and defendant signed a Note, Security Agreement and Disclosure Statement (Disclosure Statement) refinancing an earlier loan made to plaintiffs by defendant. Attachment to Defendant's Answer.

Plaintiffs argue that defendant violated the TILA in three ways. First, they argue that the description of the security interest taken in after-acquired property is inaccurate and misleading. Second, plaintiffs claim that defendant improperly calculated the refund due to plaintiffs of interest prepaid on the original loan resulting in an incomplete refund. Plaintiffs claim that the amount not refunded to them should have been and was not disclosed as part of the finance charge on the June 19th transaction. As a result of this allegedly incorrect calculation, the disclosures of the amount financed and the annual percentage rate are also claimed to be incorrect. Third, plaintiffs argue that the disclosure of a security interest in proceeds of insurance where no insurance exists violates the TILA. I need find only a single violation of the statutory requirements to hold defendant liable under the TILA. 15 U.S.C. § 1640; *Thomka v. A. Z. Chevrolet, Inc.*, 619 F.2d 246 (3d Cir. 1980). I agree with plaintiffs that the after-acquired property clause violates the TILA and therefore will not resolve the other claims.

[1] Congress declared that its purpose in enacting the TILA was to promote "the informed use of credit ... by consumers"

and "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him ...." 15 U.S.C. § 1601. *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). The TILA and the regulations[2] promulgated under it require a creditor to disclose relevant credit information to a consumer in comprehensible language and form. The required disclosures are intended to provide, especially to the inexperienced and uninformed consumer, a way to avoid "the possibility of deception, misinformation, or at least an obliviousness to the true costs" of a credit transaction. *Thomka*, 619 F.2d at 248. *See also Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976).

[2] A creditor in a TILA transaction must clearly describe or identify any security interest retained by the creditor. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5). Defendant disclosed the security interest at issue here by checking boxes next to the following items in Paragraph E of the printed Disclosure Statement:

> 2. All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.
>
> 3. Real Property (by a Mortgage and Judgment Note of even date): Address of Real Property: 2121 E. Orleans St. Phila., Pa. [address handwritten in].
>
> 4. Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.
>
> 5. Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

Note, Security Agreement, and Disclosure Statement, Attachment to Answer. Immediately following the above provision, in larger type, the form states, "AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT."

[3] The after-acquired property clause violates the TILA as to both real and personal property. First, the purported disclosure of a security interest in after-acquired real property is clearly inaccurate. Both defendant and plaintiffs agree that the mortgage defendants took in conjunction with this transaction applied only to the plaintiffs' residence at 2121 E. Orleans Street. Paragraph E.3. explicitly sets forth the legitimate security interest taken in real property. However, the after-acquired property clause contradicts Paragraph E.3. and incorrectly discloses a security interest in all real property acquired in the future by plaintiffs. An incorrect disclosure of a security interest violates the TILA and Regulation Z. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5).

[4] The inaccuracy of the after-acquired property clause as to real property alone is enough to subject defendant to liability under the TILA. However, this inaccuracy is coupled with a confusing and misleading disclosure as to after-acquired personal property. Pennsylvania law limits the security interest a creditor can hold in after-acquired consumer goods. Under 13 Pa. Cons.Stat. § 9204(d)(2) a creditor can acquire a security interest in such goods only where the debtor acquires rights in the goods within ten days after the creditor gives value. Paragraph E–2 is within the limits of Pennsylvania law. However, the bold print clause appears to grant a much broader security interest since it fails to confine the interest to property acquired within ten days.

[5] Plaintiffs argue, and I agree, that these contradictory provisions are confusing and misleading in violation of the TILA and

2. The TILA regulations, 12 C.F.R. § 226 (1979), are referred to as a group as Regulation Z.

and "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him ...." 15 U.S.C. § 1601. *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). The TILA and the regulations[2] promulgated under it require a creditor to disclose relevant credit information to a consumer in comprehensible language and form. The required disclosures are intended to provide, especially to the inexperienced and uninformed consumer, a way to avoid "the possibility of deception, misinformation, or at least an obliviousness to the true costs" of a credit transaction. *Thomka*, 619 F.2d at 248. *See also Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976).

[2] A creditor in a TILA transaction must clearly describe or identify any security interest retained by the creditor. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5). Defendant disclosed the security interest at issue here by checking boxes next to the following items in Paragraph E of the printed Disclosure Statement:

> 2. All household goods of every kind now owned or hereafter acquired within ten days of this date by Borrower, located in or about Borrower's premises set forth above.
>
> 3. Real Property (by a Mortgage and Judgment Note of even date): Address of Real Property: 2121 E. Orleans St. Phila., Pa. [address handwritten in].
>
> 4. Other Real Property: The Judgment Note of even date, when recovered or recorded constitutes a lien on all real property owned by Borrower in the County where such judgment is recovered or recorded.
>
> 5. Proceeds of insurance required or purchased in accordance with Paragraph F below payable to Lender.

Note, Security Agreement, and Disclosure Statement, Attachment to Answer. Immediately following the above provision, in larger type, the form states, "AFTER ACQUIRED REAL AND PERSONAL PROPERTY OF BORROWER WILL BE SUBJECT TO THE SECURITY INTEREST SET FORTH HEREIN AND THE COLLATERAL SECURES FUTURE AND OTHER INDEBTEDNESS OF BORROWER TO PROVIDENT."

[3] The after-acquired property clause violates the TILA as to both real and personal property. First, the purported disclosure of a security interest in after-acquired real property is clearly inaccurate. Both defendant and plaintiffs agree that the mortgage defendants took in conjunction with this transaction applied only to the plaintiffs' residence at 2121 E. Orleans Street. Paragraph E.3. explicitly sets forth the legitimate security interest taken in real property. However, the after-acquired property clause contradicts Paragraph E.3. and incorrectly discloses a security interest in all real property acquired in the future by plaintiffs. An incorrect disclosure of a security interest violates the TILA and Regulation Z. 15 U.S.C. at § 1639(a)(8); 12 C.F.R. at § 226.8(b)(5).

[4] The inaccuracy of the after-acquired property clause as to real property alone is enough to subject defendant to liability under the TILA. However, this inaccuracy is coupled with a confusing and misleading disclosure as to after-acquired personal property. Pennsylvania law limits the security interest a creditor can hold in after-acquired consumer goods. Under 13 Pa. Cons.Stat. § 9204(d)(2) a creditor can acquire a security interest in such goods only where the debtor acquires rights in the goods within ten days after the creditor gives value. Paragraph E–2 is within the limits of Pennsylvania law. However, the bold print clause appears to grant a much broader security interest since it fails to confine the interest to property acquired within ten days.

[5] Plaintiffs argue, and I agree, that these contradictory provisions are confusing and misleading in violation of the TILA and

2. The TILA regulations, 12 C.F.R. § 226 (1979), are referred to as a group as Regulation Z.

Regulation Z. Misleading and confusing disclosures as well as failures to disclose constitute violations. *Gennuso v. Commercial Bank & Trust Co.*, 566 F.2d 437 (3d Cir. 1977). Regulation Z specifically prohibits creditors from including on disclosure statements information other than that required by the TILA where that information is "stated, utilized, or placed so as to mislead or confuse the customer ... or [to] contradict, obscure, or detract attention from the [required] information ...." 12 C.F.R. at § 226.6(c).

Defendant notes that the Tenth Circuit has held that it is not a violation for a creditor to disclose a security interest in after-acquired property without further disclosing state limitations on such security interests including time limits on acquisition. *Montoya v. Postal Credit Union*, 630 F.2d 745 (10th Cir. 1980). In this case, however, there are two technically accurate disclosures on after-acquired personal property. The violation is that the disclosures are apparently contradictory and thus, I hold, are misleading and confusing under the TILA.

[6] Defendant argues that the general after-acquired property provision in the bold print simply refers back to the specifics of Paragraph E, and thus is not contradictory. Even if we accept defendant's argument, there is no reason for the additional confusing information to be present. Defendant advances no satisfactory reason to explain why the bold print clause was included on the disclosure statement. If the bold print adds nothing to the security interest taken, there is no reason to have it in the form at all. Confusion certainly would have been lessened if the bold print clause had been omitted from the form altogether. *See Gennuso, supra; Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); *Barber v. Kimbrell's, Inc.*, 424 F.Supp. 42 (W.D.N.C. 1976), *aff'd in part, rev'd in part*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978).

[7] "Enforcement [of the TILA] is achieved in part by a system of strict liability in favor of consumers who have secured financing when [the required statutory] standard is not met." *Thomka*, 619 F.2d at 248. The requirements of the TILA are highly technical but full compliance is required.[3] *Gennuso, supra.* Even minor violations of the Act can not be ignored. *Thomka, supra.*

[8] The question of whether a lender's TILA disclosures are inaccurate, misleading, or confusing ordinarily will be for the factfinder. However, where, as here, the confusing, misleading, and inaccurate character of the disputed disclosure is so clear that it cannot reasonably be disputed, summary judgment for the plaintiff is appropriate. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). *See also Gennuso, supra* (summary judgment for plaintiff on question of whether disclosure of security interest in nonexistent item is misleading); *Allen, supra* (summary judgment for plaintiff on issue of defendant's failure to make TILA disclosures in "meaningful sequence"); *Weaver v. General Finance Corp.*, 528 F.2d 589, 590 (5th Cir. 1976) (summary judgment for plaintiff where court finds defendant's disclosure "had the capacity to mislead or confuse a potential borrower ....").

Both parties have moved for summary judgment. I find there is no genuine issue of material fact as to the inaccuracy of the after-acquired property clause as applied to real property. There is also no genuine issue as to the capacity of that clause to confuse and mislead potential borrowers. Therefore I will grant the plaintiffs' motion for summary judgment.

3. Congress has addressed itself to complaints about the technicality of the TILA by amending it in the Truth in Lending Simplification and Reform Act, P.L. 26-221, 48 U.S.L.W. 124 (Apr. 22, 1980). The amendment, effective in 1982, limits liability for statutory penalties to disclosures of central importance in understanding the transaction. Inaccurate disclosure of any security interest taken remains a basis for liability however. *Id.* at 128; S.Rep., [1980] U.S. Code Cong. & Ad.News pp. 878, 892-94.

[9] The TILA provides that the consumer may recover twice the amount of the finance charge up to a maximum of $1,000. 15 U.S.C. at § 1640(a). The statutory limit applies in this case since the finance charge was $713.25. Plaintiffs are husband and wife, co-obligors on the transaction. Each seeks recovery of the statutory damages of $1,000. Defendant argues that the TILA limits consumers to one recovery per transaction. The language of § 1640(a) states that a creditor who violates the act "with respect to *any* person is liable to *such* person" in the amount provided (emphasis added). I agree with the analysis in *Cadmus v. Commercial Credit Plan, Inc.*, 437 F.Supp. 1018 (D.Del.1977) that the language of the TILA provides for separate recovery by each consumer involved in the transaction. *See also Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Allen, supra.*

The TILA also provides for a reasonable attorney fee for prevailing plaintiffs. 15 U.S.C. at § 1640(a)(3). Plaintiffs have requested an attorney's fee in this case. A petition for a fee under § 1640(a)(3) will be entertained.

Naomi D. THOMPSON, Plaintiff,

v.

VILLAGE OF EVERGREEN PARK, ILLINOIS et al., Defendants.

No. 80 C 2506.

United States District Court, N. D. Illinois, E. D.

Dec. 24, 1980.

On a motion by defendant village to dismiss a complaint charging an unconstitutional "strip search," the District Court, Shadur, J., held that: (1) allegations of complaint that village in its capacity as governing and rule-making body implemented policy of routine strip searches through adoption of formal policy or pursuant to governmental custom, which policy or custom was acted upon, executed and enforced by its various agencies and agents was sufficient pleading of responsibility of municipal corporation for actions complained of, and (2) under Illinois law, municipality was not liable for punitive damages for malicious prosecution.

Motion denied and village ordered to answer.

1. Civil Rights ⇐13.12(3)

Allegations of complaint that village in its capacity as governing and rule-making body implemented policy of routine strip searches through adoption of formal policy or pursuant to governmental custom, which policy or custom was acted upon, executed and enforced by its various agencies and agents was, in suit for alleged unconstitutional "strip search," sufficient pleading of responsibility of municipal corporation for actions complained of. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. Rules 8(a), 9(b, g), 28 U.S.C.A.

2. Civil Rights ⇐13.17

Statute provides for attorney fees for prevailing defendants in appropriate civil rights cases, though test is a stringent one, and court also has inherent power to deal with abuses if truly frivolous claims are presented. 42 U.S.C.A. § 1988.

3. Municipal Corporations ⇐743

Under Illinois law, municipality was not liable for punitive damages for malicious prosecution. S.H.A.Ill. ch. 85, § 2–102.

Sandra M. Weil, Lieberman, Levy, Stone & Schlossberg, LTD., Chicago, Ill., for plaintiff.

Alfred C. Tisdahl, Jr., French & Rogers, Chicago, Ill., for defendants.

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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WOLLMAN AND TRACEY
1518 Lewis Tower Bldg.
Philadelphia, PA 19102

December 4, 1981

Re: GRIGGS, ROBERT C. and GRIGGS, Jacqueline M.
vs.
PROVIDENT CONSUMER DISCOUNT COMPANY,
Appellant.

(D. C. Civil No. 80-01930)

No. 81-2989

Gentlemen:

The above-entitled case was docketed in this Court at No. 81-2989 and the record on appeal filed today.

In light of this court's order dated October 2, 1981, entered in No. 81-1230, please advise this office in writing if it is your intention to rely on the briefs previously filed at No. 81-1230.

If this is not your intention, the Statement of the Contents of the Appendix and Statement of Issues presented are to be furnished to the appellee within ten (10) days from this date (see Rule 30(b) of the Federal Rules of Appellate Procedure); the brief for appellant and the appendix are to be filed and served within forty (40) days from this date (see Rules 30(a) and 31 of F.R.A.P.)

Very truly yours,

SALLY MRVOS, CLERK

By Kathleen Grady
Kathleen Grady, Deputy Clerk

jj
cc: Henry J. Sommer, Esq.
Community Legal Services, Inc.
3156 Kensington Ave.
Philadelphia, PA 19134

Michael E. Kunz, Clerk
Philadelphia, PA

NOTICE TO COUNSEL: YOUR ATTENTION IS DIRECTED TO RULE 4(a)(4) F.R.A.P. IN REGARD TO THIS APPEAL.

IMPORTANT: ALL COUNSEL MUST COMPLY WITH RULE 25 BY PROVIDING THIS OFFICE WITH DISCLOSURE STATEMENT WITHIN ONE WEEK OF THE DATE OF THIS LETTER.

APPENDIX C

No. 82-5082

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,
Petitioners,

v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did not the Court of Appeals have discretion, in order to avoid manifest injustice to respondent, to excuse noncompliance with the technical requirements of Fed. R. App. P. 4(a)(4) and to decide respondent's appeal on the merits even though the notice of appeal was filed while respondent's post-trial motion was pending, where the post-trial motion was denied by the District Court four days after the notice of appeal was filed, where petitioners were not prejudiced by the premature filing of the notice of appeal and where the decision of the District Court was found to be legally erroneous and was reversed on the merits by the Court of Appeals?

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IN THE

SUPREME COURT OF THE UNITED STATES

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ROBERT C. GRIGGS and JACQUELINE M. GRIGGS,
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v.

PROVIDENT CONSUMER DISCOUNT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Provident Consumer Discount Company respectfully requests that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 2, 1982 be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 680 F.2d 927 (3d Cir. 1982). The opinion of the United States District Court for the Eastern District of Pennsylvania is officially reported at 503 F. Supp. 246 (E.D. Pa. 1980).

FEDERAL RULES OF APPELLATE PROCEDURE INVOLVED

Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R. App. P. 2 provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Fed. R. App. P. 26(b) provides:

> Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Fed. R. App. P. 4(a)(1) provides:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

COUNTERSTATEMENT OF THE CASE

Petitioners Robert C. Griggs and Jacqueline M. Griggs commenced this action against respondent Provident Consumer Discount Company[1] in the United States District Court for the Eastern District of Pennsylvania on May 21, 1980, alleging violations of the Truth in Lending Act, 15 U.S.C. §§1601 et seq. ("the Act").[2] On December 24, 1980, the District Court granted summary judgment in favor of petitioners.

On January 16, 1981, respondent filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. The appeal, however, was dismissed because the District Court's order granting summary judgment was not appealable under Fed. R. Civ. P. 54. Subsequently, on November 5, 1981, the District Court directed the entry of a separate final judgment under Fed. R. Civ. P. 54(b).

On November 17, 1981, respondent filed a timely motion for reconsideration or to alter, amend or vacate the District Court's judgment pursuant to Fed. R. Civ. P. 59. On November 19, 1981, respondent filed the Notice of Appeal to the United States Court of Appeals for the Third Circuit which is the subject of the Petition for Writ of Certiorari and this Response. Four days later, on November 23, 1981, the District Court denied respondent's post-trial motion, and the case thereafter proceeded in the Court of Appeals.

By letter dated December 4, 1981, the Clerk of the Court of Appeals informed counsel that the case had been docketed in the appellate court.[3] Approximately two months later, on February 1, 1982, petitioners moved to dismiss the appeal for lack of jurisdiction on the ground that under their interpretation of Fed. R. App. P. 4(a) (4), respondent's Notice of Appeal was ineffective because it was filed before the District Court decided respondent's post-trial motion.

---

1. Pursuant to Supreme Court Rule 28.1, the stock of Provident Consumer Discount Company, together with the stock of Provident Credit Corporation, is owned by the same individual shareholder.

2. The District Court's jurisdiction was invoked pursuant to Section 130(e) of the Act, 15 U.S.C. §1640(e) and 28 U.S.C. §1337, which confers jurisdiction over actions arising under any Act of Congress regulating commerce.

3. The Clerk's letter, attached to the Petition for Writ of Certiorari as Appendix "C", merely "directed" counsel's attention to Fed. R. App. P. 4(a)(4) in two lines near the bottom of the letter, above a notice marked as "IMPORTANT".

In an opinion and judgment issued on June 2, 1982, the Court of Appeals reversed the judgment of the District Court, holding that it had erred as a matter of law in finding that respondent violated the Act. In addition, the Court of Appeals, in footnote 2 of its opinion, found that petitioners had not been prejudiced by the premature filing of the notice of appeal and, therefore, that the matter before it was appealable even though the technical requirements of Fed. R. App. P. 4(a)(4) had not been fully satisfied. The Court of Appeals stated:

> "2. The Griggses urge that this matter is not appealable because Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that '[a] notice of appeal filed before the disposition of any of the above motions shall have no effect.' Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 882 n.2 (3d Cir.), cert. denied, 101 S. Ct. 390 (1981); Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975); accord Williams v. Town of Okeboji, 599 F.2d 238 (8th Cir. 1979). See also 9 Moore's Federal Practice ¶204.14 (2d ed. 1982). In our case, the Griggses have shown no prejudice by the premature filing of a notice of appeal." (680 F.2d at 929 n.2).

Subsequently, the instant Petition for Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT'S AVOIDANCE OF MANIFEST INJUSTICE BY EXERCISING ITS DISCRETION TO EXCUSE NONCOMPLIANCE WITH A TECHNICAL RULE OF PRACTICE IS CONSISTENT WITH THE SETTLED POLICIES OF THIS COURT AND THE FEDERAL RULES

This Court has consistently held, in a variety of factual settings, that federal rules of procedure are to be interpreted liberally to achieve substantial justice and to facilitate the resolution of cases on their merits. See, e.g., Foman v. Davis, 371 U.S. 178, 181-82 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of. . .mere technicalities"); Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

The decision by the Court of Appeals herein to determine this case on its merits, despite the technically premature filing of the notice of appeal, is in complete harmony with this settled policy. In the instant case, nothing of substance would have been gained by enforcing strict compliance with Fed. R. App. P. 4(a)(4), since respondent's post-trial motion, which was pending when the notice of appeal was filed, was denied by the District Court. Moreover, the Court of Appeals found, and petitioners do not contest, that petitioners were not in any manner prejudiced by the premature filing of the notice of appeal. By contrast, had the Court of Appeals dismissed the appeal for noncompliance with Fed. R. App. P. 4(a)(4), respondent necessarily would have suffered manifest injustice, because the legally erroneous decision of the District Court, which was reversed on the merits by the Court of Appeals, would have been permitted to stand uncorrected.

Contrary to petitioners' assertions, the Court of Appeals had plenary authority under the Federal Rules of Appellate Procedure to exercise its discretion to excuse noncompliance with Fed. R. App. P. 4(a)(4). Pursuant to Fed. R. App. P. 2, a court of appeals may on its own motion "suspend the requirements or provisions of any of these rules in a particular case" in order to expedite its decision or for other good cause shown. (Emphasis added). This salient rule "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result." (Fed. R. App. P. 2, Adv. Comm. Note).

Thus, in several recent decisions, the Third Circuit has given effect to prematurely filed notices of appeal where, as in the present case, the appellee has not demonstrated any prejudice. See, e.g., United States v. Price, - F.2d - (No. 82-5030) (3d Cir. Sept. 14, 1982), slip. op. at p. 9; Horne v. Adolph Coors Co., 684 F.2d 254, 257 (3d Cir. 1982); Tose v. First Pennsylvania Bank, 648 F.2d 879, 882 n. 2 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The rationale for the Third Circuit's position is an equitable one which effectuates the mandate of this Court in decisions such as Foman v. Davis and Conley v. Gibson, supra:

> "We are reluctant to treat the default [under Rule 4(a)(4)] as jurisdictional . . . in light of the substantial forfeiture that would result and the absence of any prejudice to appellees resulting from the premature filing. . . .We have discretion under Appellate Rule 2 to 'suspend the requirements or provisions of any of these rules in a particular case. . .on [our] own motion,' and we exercise our discretion to waive the Rule 4(a) default in this case. We do so 'to relieve litigants of the consequences of default where manifest injustice would otherwise result.' " Tose v. First Pennsylvania Bank, supra, 648 F.2d at 882 n.2. (Citations omitted).

The very fact that the legally erroneous decision of the District Court in the instant case was reversed by the Court of Appeals dramatically illustrates the wisdom of the Third Circuit's approach of allowing appeals to be decided on their merits despite noncompliance with technical rules of procedure.

Significantly, Fed. R. App. P. 2 is limited only by the qualification in Fed. R. App. P. 26(b) that, inter alia, a court of appeals "may not enlarge the time for filing a notice of appeal. . . ." The strictures of Fed. R. App. P. 26(b) are not implicated in the present case, where the notice of appeal was not filed dilatorily, but rather prematurely. Nor, as discussed infra, does significant authority exist for treating the requirements of Fed. R. App. P. 4(a)(4) as jurisdictional, so as irrevocably to deny effect to a notice of appeal filed during the pendency of a post-trial motion. Indeed, even the Advisory Committee on Appellate Rules has characterized Fed. R. App. P. 4(a)(4) as merely a desirable means of expediting the housekeeping function of the Courts of Appeals, rather than as a mandatory jurisdictional prerequisite to entertaining an appeal on the merits:

> "Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. . . . Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste [sic] effort. . . . Further, since a notice of

> appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of."

Fed. R. App. P. 4(a)(4), Adv. Comm. Note. (Emphasis added; citations omitted). See also 9 J. Moore, Federal Practice ¶204.14 (2d ed. 1982) (Rule 4(a)(4) should be held to be not jurisdictional and therefore subject to waiver).

Accordingly, there is no basis for expanding this Court's already overburdened docket to include the decision of the Court of Appeals herein, which is compatible in every respect with the liberal standards of construction previously declared by this Court and embodied in the Federal Rules. Indeed, construction of Fed. R. App. P. 4(a)(4) as a nonwaivable jurisdictional prerequisite would mark the return to inflexible pleading requirements where the form of an appeal is deemed of greater importance than its substance. The only result of strict compliance with Fed. R. App. P. 4(a)(4) in the instant case, where the post-trial motion was denied and the judgment stood as originally entered, would have been the refiling of a single paper. Such a result should not be permitted to override an appellant's right to have its case heard on the merits by a court of appeals.

II. THE PRESENT CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING HYPOTHETICAL QUESTIONS OF FIRST IMPRESSION CONCERNING THE APPLICATION AND INTERPRETATION OF FED. R. APP. P. 4(a)(4)

Claiming that the decision of the Third Circuit herein is "in square and irreconcilable conflict" with the decisions of several other Courts of Appeals, petitioners request this Court to resolve numerous questions concerning the interpretation and application of Fed. R. App. P. 4(a)(4) which, according to petitioners, "this Court has never addressed." (Petition for Writ of Certiorari, at pp. 8, 14).

However, petitioners' assertion of a serious division of opinion among the Circuit Courts on the issue whether the requirements of Fed. R. App. P. 4(a)(4) are jurisdictional in nature is grossly overstated. Thus, the cases relied upon by petitioners from the Sixth and Tenth Circuits are of questionable value as legal precedent. Because Bache Halsey Stuart Shields, Inc. v. Gitre, No. 81-1295 (6th Cir. Oct. 22, 1981), is an unpublished opinion, its precedential value even in the Sixth Circuit is doubtful. See 6th Cir. R. 24. Similarly, petitioners' citation of Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979), a decision rendered prior to the amendment of Fed. R. App. P. 4(a)(4), as authority for the "expected" position of the Tenth Circuit, is

prediction, not precedent.

The cases cited by petitioners from the Seventh, Eighth, Ninth and Fourth Circuits are either factually distinguishable from or legally consistent with the decision of the Third Circuit herein. United States v. Moore, 616 F.2d 1030 (7th Cir.), cert. denied, 446 U.S. 987 (1980), was a criminal case involving the construction of Fed. R. App. P. 4(b), which applies to criminal, not civil, appeals. United States v. Jones, 669 F.2d 559 (8th Cir. 1982), also arose in the context of a criminal appeal under Fed. R. App. P. 4(b). Significantly, however, the Eighth Circuit in Jones expressly recognized its power, where the circumstances so warrant, to exercise appellate jurisdiction under Fed. R. App. P. 4 notwithstanding the premature filing of a notice of appeal, a position which is consistent with that of the Third Circuit. 669 F.2d at 561. The Ninth Circuit in Calhoun v. United States, 647 F.2d 6, 10 (9th Cir. 1981), construed the word "disposition" in Fed. R. App. P. 4(a)(4) as synonymous with "announcement" to avoid rendering premature a notice of appeal filed after the oral denial of a post-trial motion, but before its formal entry. Finally, the Fourth Circuit in Laser Alignment, Inc. v. Warlick, 32 Fed. R. Serv. 2d 776 (4th Cir. 1981), has indicated that an argument of "considerable force" might be made for waiving the time requirements of Fed. R. App. P. 4(a)(4), "assuming that FRAP 4(a)(4) states a rule of practice and not a jurisdictional requirement." Id. at 779.

Accordingly, the reluctance of the Third Circuit to construe Fed. R. App. P. 4(a)(4) as jurisdictional is possibly inconsistent only with the decisions of the Fifth Circuit in Williams v. Bolger, 633 F.2d 410 (5th Cir. 1980) and Beam v. Youens, 664 F.2d 1275 (5th Cir. 1982), and with decisions of the Eleventh Circuit, e.g., United States v. Valdosta-Lowndes County Hospital Authority, 668 F.2d 1177, 1178 n.2 (11th Cir. 1982), which is bound by law to follow Fifth Circuit precedent. Even assuming that the Third and Fifth Circuits have at times espoused differing views as to the application and interpretation of Fed. R. App. P. 4(a)(4), the facts of the instant case make it an inappropriate vehicle for addressing the numerous hypothetical questions of first impression posed by petitioners. Here, respondent's post-trial motion was denied by the District Court just four days after the notice of appeal was filed; petitioners were not at all prejudiced by the premature filing of the notice of appeal; and dismissal of the appeal for noncompliance with Fed. R. App. P. 4(a)(4) would have shielded a legally erroneous trial court determination from corrective appellate review. Moreover, the Court of

Appeals, in footnote 2 of its opinion, did not squarely address or analyze at any length the jurisdictional issues which petitioners request this Court to review. Accordingly, the instant case does not provide a solid or clear-cut foundation upon which to establish precedent concerning Fed. R. App. P. 4(a)(4).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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